IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2582 OF 2002

IN

SUIT NO.162 OF 2002

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Canara Bank ...Plaintiff

v/s.

Apple Finance Limited ...Defendant

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Ms.Alpana Ghone i/b Dave & Girish & Co. for the Plaintiff.

Mr.A.S.Doctor i/b Kanga & Co. for the Defendant.

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CORAM: D.K.DESHMUKH, J.

DATED: 2nd September,2004

P.C.:

1. This Notice of Motion has been taken out by the Plaintiff. The Plaintiff/bank has filed this suit in its capacity as a debenture trustee. The Plaintiff claims a decree in the amount of Rs.93,84,43,990/- with interest. The Plaintiff claims that certain properties which are described at Exh.A have been mortgaged. The Plaintiff by this Notice of Motion prays for appointment of the Receiver with power to sell the properties.

2. In this Notice of Motion, ad-interim order was made on 15-1-2003. By that order, ad-interim order in terms of prayers (b) & (d) was granted. In short, by ad-interim order the Receiver was not appointed, but only order of temporary injunction was made. Against that order an appeal is filed before the Division Bench. That Appeal was registered as Appeal No.195 of 2003. In the Appeal, ad-interim order was modified and ad-interim order in terms of prayer clause (a) was granted. Liberty was given to the Defendants to apply to the Court Receiver for being appointed as agent of the Court Receiver on usual

terms and conditions including royalty.

3. The learned Counsel appearing for the Plaintiff states that the Defendants did not approach the Receiver for being appointed as the agent of the Receiver. However, the Plaintiff received a good offer for the properties which are mortgaged. Therefore, the Plaintiff moved Notice of Motion No.1368 of 2004 in this Court for an order for sale of the properties by the Receiver. In that Notice of Motion, on 18th May, 2004 an order was made that in case within a period of two weeks from 18th May, 2004 the Defendant No.1 approaches the Receiver, he may be appointed as agent of the Receiver and if he does not do so then the Receiver to submit the report to the Court for public auction of the properties. It appears from the minutes of the meeting before the Receiver that on 1-6-2004, the Receiver fixed the ad-hoc amount of royalty and directed the Defendants to execute the agency agreement. In the minutes of the meeting, it is specifically mentioned that the time granted by the Court for executing agency agreement was expiring on that date.

4. Really, speaking if the Defendants were

interested in the agency, they could have executed the agency agreement subject to their rights to challenge the amount of ad-hoc royalty fixed by the Receiver, but the Defendants did not execute the agency agreement. In stead, they filed Chamber Summons for reducing the amount of royalty. The learned Counsel appearing for the Plaintiff, therefore, submits that considering the conduct of the Defendants of not executing the agency agreement till today without there being any valid reason for not doing so, there is no reason why the properties should be retained and the Defendants should be appointed as agent of the Receiver. The learned Counsel, therefore, submits that the liberty that is granted by the ad-interim order should not be continued and in stead the Receiver should be directed to sell the mortgaged properties in relation to which the Receiver has been appointed. She relies on the judgment of the Supreme Court in the case of **Industrial Credit & Investment Corporation** of India Ltd. and ors. v/s. Karnataka Ball Bearings Corpn. Ltd. & ors, (1999) 7 SCC 488 and submits that there is no embargo on the power of the Court in directing the Receiver to sell the properties, though no decree is passed, specially because in the present case no

reply has been filed by the Defendants disputing averments in the affidavit filed in support of the Notice of Motion and disputing the liabilities of the Defendants.

5. The learned Counsel appearing for the Defendants is present in Court. Defendants have not filed any reply in this Notice of Motion. Therefore, in the absence of any reply, averments in the affidavit filed in support of the motion have to be accepted at their face value. In any case, it is clear from the documents that have been produced with the plaint that there is hardly any possibility of there being any dispute that the claim in the suit which is huge is payable by the Defendants to the Plaintiff. Considering the conduct of the Defendants of not executing the agency agreement, though liberty was given to them more than a year back by the Appellate Court, in my opinion, leaves me with no option but to direct the Receiver to sell the properties. Even according to the Defendants, building is incomplete and therefore no useful purpose will be served by merely appointing an agent. Though it is the case of the Plaintiff that the Plaintiff has received good offers for the purchase of the properties, in my

opinion, it will not be appropriate to permit sale by private treaty. The Court Receiver is accordingly, directed to take steps to sell the properties by inviting bids by publication of advertisement in the newspaper by following the usual procedure that is followed by the Court Receiver.

6. Notice of Motion accordingly is granted in terms of prayer clause (a) with power to the Receiver to sell the properties and realise the sale-proceeds. The Receiver, therefore, shall immediately take steps to take physical possession of the properties from the Defendants who are in possession of the properties and thereafter take steps to sell the properties in accordance with law by inviting bids.

Till the Receiver takes possession, ad-interim order in terms of prayer clause (b) and (d) shall operate.

At the request of the learned Counsel appearing for the Defendants, the Receiver is directed not to take physical possession for a period of three weeks from today. However, in the meantime the Receiver shall be at liberty to take other steps for sale of the

properties.

Court Receiver & parties to act on ordinary copy of the order duly authenticated by the Associate/ Personal Secretary of the Court as a true copy.

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